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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1153

FRITZ KYER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No.

FRITZ KYER,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a Writ of Certiorari issue to review the erroneous decision and judgment of the United States Court of Claims entered on December 16, 1966.

THE OPINIONS BELOW

The Opinion of the Court of Claims is printed in the Appendix hereto, infra, p. B-1, et seq. The Opinion and Report of Commissioner Willi of the Court of Claims is printed in the Appendix hereto, infra, p. C-1, et seq.

JURISDICTION

The Court of Claims decided the case below on December 16, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether petitioner can be deprived of the commissions he earned arising out of his sales of industrial alcohol made from surplus grapes produced in California under a sales commission contract, which petitioner entered into with agents for the United Estates, established and controlled by the Secretary of Agriculture, pursuant to authority vested in the Secretary by the Agricultural Marketing Agreement Act of 1937, as amended.

2. Whether respondent can immunize contractual obligations made on behalf of the United States through authorized agents appointed by the Secretary of Agriculture from being enforced by legal proceedings in the State Court of California, the United States District Court for the Southern District of California or the United States Court of Claims, on the premise the Secretary has not consented to suits on contracts entered into under the Marketing Agreement Act of 1937, as amended. Particularly on the theory that immunity from all legal actions involving respondent are barred because of lack of consent, either express or implied, arises from the failure of the Secretary to use Congressional appropriated funds in support of sales of industrial alcohol made from surplus grapes covered by authorized marketing orders of respondent issued by the Secretary.

3. Whether petitioner was deprived of his constitutional right to just compensation for sales services rendered in disposing of surplus alcohol under authorized programs of respondent carried out by the Secretary of Agriculture under the guise; first, of taking the position that the Committee, that is, the agent of the Secretary which contracted with petitioner to sell industrial alcohol, while authorized, cannot be sued by name and that such a suit would only lie against the United States, in order to have an action by petitioner in the State Court of California transferred from that Court to the United States District Court for the Southern District of Cali-

fornia; second, after removal, by asserting in the District Court that the action against the agent of the Secretary, that is, the Committee, cannot be maintained, as the action is one against the United States and in effect, as it involves more than Ten Thousand Dollars ($10,000.00), had to be filed in the United States Court of Claims; and third, by asserting in the Court of Claims after the Secretary withdrew the authority of his agent and took the monies available for the payment of petitioner's commissions into the Secretary's personal custody, could properly persuade the United States Court of Claims to dismiss the action on the theory the failure of the Secretary not to implement sales duties concerning the disposal of surplus alcohol through the use of appropriated funds resulting in "executive" absence of appropriated funds to finance such sales, bound the Court of Claims to dismiss the Petition below.

The Secretary persuaded the court below, contrary to law, to hold, notwithstanding he had the monies produced by petitioner out of which petitioner's commissions could be paid, because "the contract" would not be satisfied from available appropriated funds and notwithstanding "the Secretary currently holds a purse" out of which petitioner's claim can be satisfied, the court below lacked jurisdiction to compel the Secretary to do anything in regard to petitioner's just claim. The court below admitted "the result spells an unduly harsh outcome" and in solace said petitioner's payment for his commission for the work he performed for respondent "is a matter which sorely needs Congressional correction." (Tr. 99-100, App.,[1] pp. C 7-8, infra)

The Court of Claims has decided a Federal question of substance not heretofore determined by this Court and has decided this question in a way which is not in accord with the applicable decisions of this Court. The

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[1] App. refers to the Appendix printed at end of this Petition.

questions involved are important, as they relate to the proper, honest and fair administration of the orders and actions of the Secretary of Agriculture taken under the Marketing Agreement Act of 1937, as amended, which actions should be considered, reviewed and corrected in the proper administration of the act and in the interests of common justice and fair play.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The applicable provision of the Constitution, the Marketing Agreement Act of 1937, as amended, 7 U.S.C., Sec. 601 *et seq.*, and the orders and regulations thereunder are lengthy, hence they have been printed in the Appendix to this Petition at pages D-1 et seq., infra, with the exception of the Tucker Act (24 Stat. 505, as amended, 28 U.S.C. Sec. 1491), which in conferring jurisdiction on the court below, reads:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

STATEMENT OF THE CASE

We adopt as a Statement of the Facts involved the facts as found by Commissioner Willi of the court below in his Opinion of December 17, 1965 (Tr.[2] 31-36; Appendix pp. B-2 to B-8).

The relevant facts, none of which are disputed, are simple and straightforward.

Plaintiff, a United States citizen and resident of Fresno, California, is a broker licensed to deal

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[2] Tr. refers to the transcript of the proceedings below, filed with this Petition.

in alcohol, wines, and various other distilled spirits.

In 1962, he entered into a sales commission contract with the Grape Crush Administrative Committee, an unincorporated association created under a federal marketing order issued by the Secretary of Agriculture with respect to grapes produced in various specified counties of California.

Under the plaintiff's contract he was to secure an interested purchaser for a quantity of industrial alcohol that had been made from surplus grapes produced in the California area covered by the marketing order. For this service he was to receive a commission of one cent per gallon of alcohol sold. He located a purchaser, Publicker Industries, and the sale was made but the Committee refused to pay the stipulated commission.

The litigation that followed, and has now culminated here, began in a California state court. On request, the defendant's attorney has furnished copies of certain documents of record in that earlier litigation from which its pertinent details may be gathered.

On June 30, 1964, plaintiff filed suit in the Superior Court of the State of California for the County of Fresno against the Grape Crush Administrative Committee and sixty-two of its members named as "John Does."

On July 8, 1964, the United States Attorney for the Southern District of California filed with the United States District Court for the Northern Division of that District, a petition for removal of the action to federal court pursuant to the provisions of 28 U.S.C. Sec. 1442(a)(1). The substantive allegation of the petition was:

> That the above-captioned action is one which may be removed to this Court pursuant to Section 1442 of Title 28, United States Code, for the reasons that said defendant Grape Crush Administrative Committee is an agency of the United States of America designated by the Secretary of Agriculture to administer the Federal Marketing Order, 7 C.F.R. 990.29. See *United States v. Levine*, 129 F.2d 745 (1942).

On July 9, 1964, the District Court, apparently accepting the representations quoted above, issued an order for removal.

On September 1, 1964, in the District Court to which plaintiff's suit had been removed, the United State's Attorney filed a motion to dismiss. The grounds of the motion were (1) that the court lacked jurisdiction over the defendant; (2) that the court lacked jurisdiction over the subject matter of the action; and (3) that the complaint failed to state a claim on which relief could be granted.

In a supporting memorandum the United States Attorney urged that the Committee, as an " * * * integral part of the Department of Agriculture and of the United States", could not be sued *eo nomine* because Congress had not consented to suit against it. For the same reason, it was asserted, the plaintiff had failed to state a claim on which relief could be granted.

It was further contended that suit did not lie against the individual Committee members, named as "John Does," for two reasons. First, it was said that Rule 17, F.R.C.P., did not authorize suit against "fictitious defendants" and, second, that under a regulation promulgated by the Secretary of Agriculture the Committee members were immunized from personal liability on account of any acts of omission or commission within the scope of their committee work.

On October 1, 1964, eleven days before the District Court dismissed the suit with prejudice for failure to state a claim on which relief could be granted, plaintiff filed suit against the United States in this court for the same commission that he had initially attempted to recover from the Committee and its members.

According to the defendant, it is the doctrine of sovereign immunity in its generally understood sense that defeats this court's jurisdiction in the within case. The focus is thus on the Government's amenity to suit against it on this claim rather than on the liability implications of the merits of the claim.

> Defendant says that the absence of Congressional consent to this suit follows as a matter of law from the fact that the Grape Crush Committee is a "nonappropriated-fund activity." Whatever other functional characteristics that term may connote, the dispositive attribute, according to the defendant, is the fiscal fact that the Committee's operations are not underwritten by appropriated funds. Thus, the claim is that when Congress fails to appropriate funds in furtherance of an activity, whether or not governmental in nature, it must be deemed to have withheld its consent for suits against the United States on contract claims arising therefrom.

The court below did not depart from the Commissioner's facts and stated them to be as follows (Tr. 94-95; App. pp. C 2-3):

> Plaintiff is a broker, licensed to deal in alcohol, wines, and various other distilled spirits. In 1962, he entered into a sales commission contract with the Grape Crush Administrative Committee (hereinafter the "Committee"). Under the terms of the contract, plaintiff was to secure a purchaser for a quantity of industrial alcohol that had been made from surplus grapes and, in consideration therefor, he was to receive a 1-cent-per-gallon commission. It is alleged that a purchaser was located and a sale consummated, but that demand for the commission was refused.
>
> Plaintiff's action was initially commenced in a California State Court, whence, upon petition of the United States Attorney for the Southern District of California, the suit was removed to the appropriate United States district court. Removal was predicated upon 28 U.S.C. Sec. 1442(a)(1) which provides, in pertinent part, for the removal of any civil or criminal action, involving, among others, a suit commenced against any agency of the United States.
>
> Upon removal of the action to the district court, plaintiff was confronted with a motion to dismiss. In a supporting memorandum, the United States Attorney urged that the Committee, as an " * * * integral part of the Department of Agriculture and of the United States * * *," could not be sued *eo nomine* because Congress had not consented to suit

against it. See, e.g., *Blackmar v. Guerre*, 342 U.S. 512 (1952). It was further contended that suit did not lie against the individual Committee members, named as "John Does," for two reasons. First, it was said that Fed. R. Civ. P. 17 did not authorize suit against "fictitious defendants" and, second, that under a regulation promulgated by the Secretary, the Committee members were immunized from personal liability on account of any acts of omission or commission within the scope of their Committee work. Plaintiff's suit was dismissed, with prejudice, for failure to state a claim upon which relief could be granted. *Kyer v. Grape Crush Administrative Comm.*, Civil No. 2508-ND, S.C. Cal., Order of October 12, 1964. In this present action, plaintiff is again faced with a motion to dismiss.

Based upon the premise that the Secretary's authority to obligate appropriated monies was "discretionary" and because of his executive discretion not to use appropriated funds, public funds were not available to pay petitioner's commission for the sale of industrial alcohol under his contract, according to the court below (Tr. 99; App. p. C-7). Therefore, because of these "executive" actions of the Secretary, the court below held it lacked jurisdiction to afford petitioner any relief, notwithstanding, "The fact that the Secretary currently holds a purse out of which plaintiff's (petitioner's) claim may possibly be satisfied * * *."

REASONS FOR GRANTING THE WRIT

Several of the reasons and considerations governing review on Certiorari by this Court are present in this case. The court below has rendered a decision in conflict with the decisions of this Court, in conflict with another Court of Appeals and has decided an important question of Federal law in regard to the proper administration of the Agricultural Marketing Agreement Act of 1937, as amended, and the regulations and procedures of the Secretary of Agriculture thereunder, which have not been but should be settled by this Court, and has decided these important Federal questions in a way which conflicts

with the applicable decisions of this Court. The court below in rendering its erroneous decision has sanctioned such an unusual and "harsh" course undertaken by respondent through its Secretary of Agriculture as to deprive petitioner, an American citizen, of his constitutional right not to have his services taken without the payment of just compensation therefor, contrary to the provision of the Fifth Amendment to the Constitution of the United States. The court below has rendered a decision which seriously restricts the jurisdiction of that court to hear cases involving contracts entered into, either express or implied, between citizens of the United States and the respondent, and to adjudicate and determine such contract cases as provided for in the Tucker Act on the merits. This restriction of the usual course of judicial proceedings in the court below, contrary to that court's jurisdiction, sanctions such a departure from that court's usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This Court should correct the "harsh" inequities arising out of such a restriction of the jurisdiction of the court below and should direct that court to adjudicate contract cases like petitioner's on the merits.

I.

The Secretary Cannot Utilize and Take Petitioner's Services, Which Are Property, Without Paying Just Compansation for Those Services

The personal services, that is, the right of the citizen to work and earn a livelihood is a property right. This property right cannot be taken by respondent without paying just compensation for that right. The Fifth Amendment to the Constitution provides that no property of the citizen may be taken without paying just compensation therefor, and in accordance with due process of law. This is aptly stated by this Court in its landmark

decision in *United States v. Lee*, 106 U.S. 196, 1 S. Ct. 240, at p. 260:

> It is not pretended, as the case now stands, that the president had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation.
>
> These provisions for the security of the rights of the citizen stand in the constitution in the same connection and upon the same ground as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that constitution. As we have already said, the writ of *habeas corpus* has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive and the legislative branches of the government. See *Ex parte Milligan*, 4 Wall. 2, and the case of *Kilbourn*, discharged from the custody of the sergeant-at-arms of the house of representatives by Chief Justice Carter. *Kilbourn v. Thompson*, 103 U.S. 168.
>
> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

> Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government, and the docket of this court is crowded with controversies of the latter class.

When the Secretary, through his authorized Committee, contracted with petitioner to sell surplus alcohol for a commission and petitioner, relying upon this contract, sold the alcohol and earned his commission, petitioner is entitled to be paid that commission as his just compensation. As *Lee* holds, there is no power in either the legislative or executive branch of the government to deprive petitioner of such just compensation.

Where respondent takes private property without paying for it the owner has his remedy in the court below under the Tucker Act.

In *United States v. Cobb*, (C.C.A. 9, 1964) 328 F.2d 115, the Court of Appeals held (p. 117):

> "Of course it is elementary that the Government could take property without any deposit and leave the owner to his remedy in the Court of Claims under the Tucker Act. *United States v. Dow*, 357 U.S. 17, 21, 78 S. Ct. 1039, 2 L. Ed. 2d 1109."

In *United States v. Dow*, (1958) 357 U.S. 17, 78 S. Ct. 1039, this Court so held (p. 1044):

> "Broadly speaking, the United States may take property * * * it can enter into physical possession of property without authority of a court order * * * and the property owner is provided a remedy under the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491, 28 U.S.C. §§ 1346(a) 1491 to recover just compensation. See *Hurley v. Kincaid*, 285 U.S. 95, 104, 52 S, Ct. 269, 76 L. Ed. 637."

The Tucker Act (28 U.S.C., Sec. 1491) waives sovereign immunity to suits against the United States founded on contract obligations, express or implied. As Com-

missioner Willi in his Opinion stated Congress has at no time narrowed this general waiver of immunity (Tr. 41; App. p. B-10, infra). Hence, the court below had jurisdiction to adjudicate petitioner's contract claim on the merits.

The court below in holding there was a lack of jurisdiction in the California State Court, in the District Court and in the court below has decided important questions, seriously curtailing the jurisdiction of the courts below and its decision should be reviewed and determined in order to provide for the proper administration of judicial proceedings in the courts below.

II.

It Is Admitted That Petitioner's Contract Was One With the United States and Created a Contract Liability, Hence Petitioner's Right to Compensation Under That Contract Is Judicially Enforceable by the Court of Claims

The Grape Crush Administrative Committee is an agency of the United States selected by the Secretary of Agriculture pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended. Funds of the Committee arising from the sale of alcohol among other things, admittedly are available to pay the compensation earned by petitioner in selling surplus alcohol on behalf of the United States. The court below recognized that these funds which the Secretary currently holds constitutes "a purse out of which plaintiff's (petitioner's) claim may possibly be satisfied." The decision below rests upon the premise that the "absence of appropriated funds" brought about solely through the result of the executive actions of the Secretary bars the court below from adjudicating the case on the merits. This decision runs counter to *United States v. Levine*, C.C.A. 2, 1942, 129 F.2d 745. *Levine* holds under an almost identical exercise of the executive powers of the

Secretary under the Agricultural Marketing Agreement Act of 1937, as amended, that the fact the funds for the handling of milk do not come from appropriations does not render the activities anything other than activities of the United States. *Levine* held, p. 747:

> Although the funds for administration of the order come not from the Department of Agriculture, but are taxed directly to the handlers in the area in proportion to the number of pounds of milk each handler receives, this does not make the Administrator any the less an agency of the United States since the receipt of the funds is pursuant to the authority of the United States as delegated to the Secretary and to the Administrator.

Levine upheld a conviction against an employee of the Administrator, like petitioner here, who was being paid out of non-appropriated funds, of receiving a bribe while acting in behalf of the United States in an official capacity. When debts or obligations are owed to agencies of the Department of Agriculture, like the Grape Committee in California, debts owed to such an agency are considered debts owed to the United States, whether they are incurred in the name of the United States or the agency.

Thus, in *United States Department of Agriculture v. Remund* (1947), 330 U.S. 539, 60 S. Ct. 891, this Court held, p. 893:

> Hence any debt owed the Farm Credit Administration is a debt owed the United States within the meaning of Sec. 3466.

Conversely, contract liabilities, express or implied, created by any officer or official body of the government with power to make such contracts, which is admitted in our case, are judicially enforceable in the Court of Claims against the United States. In *Eastern Extension, Australasia & C. T. Co. v. United States* (1920), 251 U.S. 355, 40 S. Ct. 168, this Court so held (pp. 171-172):

> In the jurisdiction given to the Court of Claims Congress has consented that contracts, express or implied, may be judicially enforced against the government of the United States. But such a liability can be created only by some officer of the government lawfully invested with power to make such contracts or to perform acts from which they may be lawfully implied. Langford v. United States, 101 U.S. 341, 345, 25 L. Ed. 1010; United States v. Buffalo, Pitts Co., 234 U.S. 228, 34 S. Ct. 840, 58 L. Ed. 1290; Tempel v. United States, 248 U.S. 121, 39 S. Ct. 56, 63 L. Ed. 162; Ball Engineering Co. v. J. G. White, 250 U.S. 55, 39 S. Ct. 393, 63 L. Ed. 835.

The theory of the court below that appropriated funds cannot be obligated to pay the expenses involved in the sale of surplus alcohol by petitioner is unfair, tenuous and unsound. The court below admits the non-availability of appropriated funds to pay petitioner's just commission comes about *only* through the "executive" action of the Secretary (Tr. 99; App. p. C-7, infra) because Congress has appropriated funds which cover the expenses sought, citing 7 U.S.C., Sec. 612(c) (Tr. 98-99; App. p. C6-7, infra). The Secretary, to frustrate the payment of petitioner's just claim, took several actions. First, he has not by order used his authorized appropriated funds to pay this just claim. Second, he seized funds of the Committee in California to prevent petitioner from obtaining payment from such funds.

We submit this Court should reverse the decision below and instruct the Court to adjudicate petitioner's claim on the merits in order that there may be a judicial determination of such contractual obligations, like petitioner's, in the general jurisdiction of the Court of Claims as authorized by the Tucker Act. The court below cites only one case other than an earlier decision of that court along similar lines, i.e., *Blackmar v. Guerre* (1952), 342 U.S. 512, 72 S. Ct. 410. We do not see how *Blackmar* aids the court below.

In *Blackmar* this Court held the Civil Service Commission was not a corporate entity, hence a suit involving any actions of the Commission must be brought against the individual Commissioners as members of the Commission, in the residence of the Commissioners, that is, in the Courts of the District of Columbia. This Court, accordingly, affirmed the dismissal of an action filed in the name of the United States Civil Service Commission in the United States District Court for the Eastern District of Louisiana because the members of the Civil Service Commission were never served and could not be served in Louisiana. We submit the inapposite-ness of *Blackmar* is plain and has been patently misconstrued by the court below.

III.

The Decision Below Misconstrued 28 U.S.C., Sec. 2517 as Limiting the Jurisdiction of That Court Under the Tucker Act, 25 U.S.C., Sec. 1491, and This Erroneous Decision Should Be Reviewed and Corrected by This Court in the Proper Administration of Litigation in the Court Below and in the Interest of Common Justice

The court below held (Tr. 97; App. p. C-5, infra):

> The jurisdiction of this court under the Tucker Act encompasses "any claim against the United States: * * * founded upon any express or implied contract with the United States; * * *." While the terms of this statute are broad, its words must be read in conjunction with and must be regarded as limited by another statute which provides that our judgments are paid only from appropriated funds.[15]

[15] 28 U.S.C. § 1491 (1964)

The court below (Tr. 96; App. p. C-4, infra) admits petitioner's contract was made with a Committee which was an agency of the United States and was authorized to enter into our contract and respondent "affirms the Com-

mittee status as an agency of the United States." The court below admits, in dismissing the Petition below "for lack of jurisdiction," that "the jurisdiction of this Court under the Tucker Act encompasses 'any claim against the United States; * * * founded upon any express or implied contract with the United States; * * *.'" The court below then announced a novel and dangerous doctrine, which is contrary to the decided cases, the Tucker Act must be regarded as limited by another statute providing for the payment from appropriated funds of judgments, namely, 28 U.S.C., Sec. 2517.

28 U.S.C., Sec. 2517 states in part:

> (a) Every final judgment rendered by the Court of Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court.

28 U.S.C., Sec. 2517 is a statute concerned only with how judgments rendered by the Court of Claims shall be paid and does not limit the jurisdiction of the Court of Claims to enter judgments under the Tucker Act. The same can be said of 31 U.S.C., Sec. 724(a), also involved here, reading in part:

> There are appropriated, out of any money in the Treasury not otherwise appropriated, and out of the postal revenues, respectively, such sums as may on and after July 27, 1956 be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements not in excess of $100,000, * * *.

In order to come within 31 U.S.C., Sec. 724(a), petitioner reduced his claim to $100,000 (Tr. 24). Commissioner Willi held (Tr. 64; App. p. B-26, infra) statutes like 31 U.S.C. 724(a) are solely concerned with the mode of paying judgments and concern themselves with satisfaction and not with any creation or limitation of Federal liability under the Tucker Act, citing

United States v. Turner (C.C.A. 8, 1931), 47 F.2d 86. We agree with Commissioner Willi (and disagree with the court below) these paying judgment statutes in no way enlarge or restrict the jurisdiction of the Court of Claims. We submit this matter was settled by the early decision of this Court in *United States v. Jones* (1886), 119 U.S. 477, 7 S. Ct. 283. In *Jones* the United States moved to dismiss an appeal from a judgment of the Court of Claims on the ground that statutes dealing with the manner and method of how Court of Claims' judgments should be paid limited the jurisdiction of the Supreme Court to review such judgments. In denying the motion to dismiss and in upholding the jurisdiction of this Court in Court of Claims cases, this Court held (p. 284):

> Reference is now made in argument to section 236 of the Revised Statutes, which provides that all claims and demands against the United States shall be settled and adjusted in the department of the treasury, and it is claimed that this is the equivalent of the objectionable fourteenth section as a bar to our jurisdiction. This section of the Revised Statutes is not new law. It was first enacted as section 2 of the act of March 3, 1817, c. 45, (3 St. 366) and it has been in force ever since. It evidently relates to an entirely different class of duties from that to which the payment of the judgments of the court of claims belongs. As to such judgments, the duty of the secretary of the treasury is to pay them out of "any general appropriation made by law for the payment and satisfaction of private claims, on presentation" to him "of a copy of said judgment, certified" according to law. Rev. St. Sec. 1089. Of course this applies as well to special appropriations made for the satisfaction of the particular judgment. Under this statute the secretary has no power whatever to go behind the judgment in his examination.

Turner reached the same result as *Jones* and the Circuit Court of Appeals there held (p. 88) statutes involving the mode of paying judgments and the allowance of interest do not detract or confer jurisdiction on the courts involved, including the Court of Claims, and that

such statutes leave the main provisions of the law conferring jurisdiction on the courts "unchanged."

This Court has never held that statutes involving the manner and method of paying judgments of the Court of Claims limit the Tucker Act, particularly as reenacted by Congress in 1964, limit in any manner the jurisdiction of the court below to adjudicate "any claims against the United States, *** founded upon any express or implied contract with the United States," like the admitted contract here involved.

The question involved is one of importance and should be resolved in order that the jurisdiction of the Court of Claims may be not restricted on the theory that 28 U.S.C. 1491 restricts the broad waiver of sovereignty involved in the Tucker Act. The very passage of such Acts as 28 U.S.C., Sec. 1491 and 31 U.S.C., Sec. 724(a) shows that Congress intended to pay Court of Claims' judgment whether an appropriation was available when the judgment was entered or not. The decision below destroys this Congressional policy and should be corrected in the public interest.

Moreover, the interests of justice require that the decision below be reviewed and reversed by this Court. Petitioner, admittedly in good faith, entered into a valid contract with the United States. Petitioner performed that contract and sold the alcohol involved for the United States and thus earned his admitted commission. The Secretary of Agriculture has barred every effort of petitioner to be paid just compensation for his services by legal legerdemain. First the Secretary refused to pay petitioner from available appropriated funds, i.e., by "executive discretion". The Secretary had petitioner's case in the California State Court against his Committee removed to the District Court on the ground the Committee was an authorized agent of the United States. The Secretary moved to dismiss in the District Court on the ground the Committee had been immunized by him and

could not be sued for contracts entered into with United States citizens because such suit should be filed only against the United States. Lastly, in the Court of Claims after removing the monies of the Committee available to pay petitioner's claim from California and placing the monies in the Secretary's personal possession, moved to dismiss the Petition below on the ground appropriated monies of the United States could not be obligated to pay for petitioner's services. Commissioner Willi stated these actions were inequitable and thought the District Court in California should have retained jurisdiction and awarded a money judgment to plaintiff, which could have been satisfied out of proceeds then in the possession of the Committee, and this was the basic reason for his recommendation for dismissal. The court below admits the Secretary's actions are harsh and have brought about an unduly harsh outcome. The Court in this regard said (Tr. 99-100, App. pp. C 7-8, infra):

> We are mindful of the fact that the result reached spells an unduly harsh outcome. Plaintiff has searched in vain for a forum in which the merits of his claim might be aired. We add, though perhaps of little comfort, that the lack of jurisdiction which plaintiff has faced at every turn is a matter which sorely needs congressional correction.

We submit the situation as stated by the court below cannot be the law. Such a situation is tantamount to tyranny and borders on anarchy. We submit Congress gave the appropriate remedy in enacting the Tucker Act.

In recent years this Court has made it clear that it will disregard rules of court, legal technicalities and the interest in the finality of litigation where the interests of justice make their application "unfair." Thus, in *United States v. Ohio Power Company* (1957), 353 U.S. 100, 77 S. Ct. 652, this Court reopened a tax case a year and a half after denial of Certiorari to afford justice and fair play, and held (p. 653):

> We have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules. This policy finds expression in the manner in which we have exercised our power over our own judgments, both in civil and criminal cases. Clark v. Manufacturers Trust Co., 337 U.S. 953, 69 S. Ct. 1525, 93 L. Ed. 1754; Goldbaum v. United States, 347 U.S. 1007, 74 S. Ct. 861, 98 L. Ed. 1132; Banks v. United States, 347 U.S. 1007, 74 S. Ct. 861, 98 L. Ed. 1132; McFee v. United States, 347 U.S. 1007, 74 S. Ct. 862, 98 L. Ed. 1132; Remmer v. United States, 348 U.S. 904, 75 S. Ct. 288, 99 L. Ed. 710; State of Florida ex rel. Hawkins v. Board of Control, 350 U.S. 413, 76 S. Ct. 464, 100 L. Ed. 486; Boudoin v. Lykes Bros. S.S. Co., 350 U.S. 811, 76 S. Ct. 38, 100 L. Ed. 727; Cahill v. New York, N. H. & H.R. Co., 351 U.S. 183, 76 S. Ct. 758, 100 L. Ed. 1075; Achilli v. United States, 352 U.S. 1023, 77 S. Ct. 588.

Following *Ohio Power Company* in *Gondeck v. Pan American World Airways, Inc.* (1965), 382 U.S. 25, 86 S. Ct. 153, this Court permitted the filing of a Petition for Rehearing to reopen a final order of denial of certiorari entered October 8, 1962, in order that "justice" be done and compensation due be paid, which was so ordered, and in doing so held (p. 154):

> On June 11, 1962, we denied certiorari. 370 U.S. 918, 82 S. Ct. 1556, 8 L. Ed. 2d 499. On October 8, 1962, we denied a petition for rehearing. 371 U.S. 856, 83 S. Ct. 17, 9 L. Ed. 2d 93. We are now apprised, however, of "intervening circumstances of substantial * * * effect," * * * justifying application of the established doctrine that "the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules." United States v. Ohio Power Co., 353 U.S. 98, 99, 77 S. Ct. 652, 653, 1 L. Ed. 2d 683.

We state if ever there was a case where the interests of justice and fair play require a review by this Court, this is such a case.

CONCLUSION

For the reasons stated in this Petition, petitioner prays that a Writ of Certiorari issue to review the erroneous and harsh judgment of the United States Court of Claims.

Respectfully submitted,

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